SUPREME COURT, U. S.

No.

FILED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

841

MAE GENTILE, LAWRENCE S. SMITH, JR.,
GRACE KOCH, ELAINE GARGULIO,
FRANK SMITH, NATALIE MOSCA

Petitioners

vs.

HOWARD S. IVES,
State Highway Commissioner, State of Connecticut

Respondent

Petition for a Writ of Certiorari to
the Supreme Court of the State of Connecticut

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PETITION FOR CERTIORARI

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Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

The petitioners, Mae Gentile, Lawrence S. Smith, Jr., Grace Koch, Elaine Gargulio, Frank Smith and Natalie Mosca, pray that a writ of certiorari issue to review the opinion and judgment of the Supreme Court of the State of Connecticut entered in this proceeding on June 23, 1970.

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OPINIONS BELOW

The opinion of the Supreme Court of Connecticut is reported at 159 Connecticut Reports _____ and 31 Connecticut Law Journal 52, appears at Appendix A, infra, pp. 10-17. Petitioners Motion to Reargue to the Supreme Court of Connecticut was denied without opinion on July 21, 1970. The judgment of the Superior Court of the State of Connecticut is unreported and appears at Appendix B, infra, pp. 18-20.

JURISDICTION

The opinion of the Supreme Court of the State of Connecticut was entered on June 22, 1970. See Appendix A, infra pp. 10-17. Motion to Reargue was denied on July 21, 1970. This petition for certiorari was filed less than 90 days from the date aforesaid. The jurisdiction of this court is invoked under 28 U.S.C. 1257 (3).

QUESTION PRESENTED

In a trial where the sole issue is the determination of just compensation for the taking of private property by eminent domain, whether the refusal of the trial court to admit evidence to establish that the State's agents had improperly determined their assessment of damage to the Petitioner's property by reason of their failure to follow applicable State statutes and administrative procedures, is consistent with the due process clause of the Fourteenth Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment XIV, Section 1, provides in pertinent part as follows:

> "nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

Connecticut Constitution, Article I, Section 8, provides in pertinent part as follows:



"No person shall be . . . deprived of life, liberty or property, without due process of law . . ."

Connecticut Constitution, Article I, Section, 11, provides:

"The property of no person shall be taken for public use, without just compensation therefor."

Section 13a-73 subsection (b) of the 1967 Supplement to the Connecticut General Statutes, entitled "Condemnation of Land for State Highway or Highway Maintenance Storage Area or Garage", provides as follows:

The commissioner may take any land he finds necessary for the layout, alteration, extension, widening, change of grade or improvement of any state highway or for a highway maintenance storage area or garage and the owner of such land shall be paid by the state for all damages and the state shall receive from such owner the amount or value of all benefits resulting from such taking, layout, alteration, extension, widening, change of grade or other improvement. The use of any site acquired for highway maintenance storage area or garage purposes by condemnation shall conform to any zoning ordinance or development plan in effect for the area in which such site is located. The assessment of such damages and of such benefits shall be made by the commissioner and filed by him with the clerk of the superior court in the county in which the land affected is located, and such clerk shall give notice of such assessment to each owner of land affected thereby by mailing to each a copy of the same, postage prepaid, and, at any time after such assessment has been made by said commissioner, the physical construction of such layout, alteration, extension, widening, maintenance storage area or garage, change of grade or other improvement may be made. Upon filing an assessment with the clerk of the superior court, the commissioner shall forthwith sign and file for record with the town clerk of the town wherein such real property is located a certificate setting forth the fact of such taking, a description of the real property so taken and the names and residences of the owners from whom it was taken. Upon the filing of such certificate, title to such real property in fee simple shall vest in the state of Connecticut except that, if it is so specified in such certificate, a lesser estate, interest or right shall vest in the state. (1967, P.A. 507, S. 1.) Effective June 20, 1967.

STATEMENT OF THE CASE

The case originated on June 26, 1968 with the Petitioner's appeal pursuant to Section 13a-76 of the Connecticut General Statutes (Revision of 1958), (C.G.S.), (Appendix C, infra p. 22), from an assessment of damages filed by the Highway Commissioner of the State of Connecticut (Commissioner) for the taking of the Petitioner's property in Bridgeport, Connecticut, for highway purposes. (Record pp. 1-2) The Commissioner assessed damages at $9,000, which the Petitioners found to be inadequate, having secured two professional appraisals estimating the fair market value of the property to be $20,700 and $19,900 respectively. The case was assigned to the Honorable James E. Murphy, a State Referee, for trial. (R. p. 3)

The Commissioner's Assessment of damages was dated May 27, 1967 and was based upon an appraisal report by an independent appraiser, William H. Ball, who found the fair market value of the property to be $9,000. (R. p. 11)

Prior to securing the Ball report the Commissioner had hired John D. Hastings, Inc. to appraise the Petitioners' property. The Hastings appraisal was prepared by its employee, Robert H. Wynn. He found the fair market value of the property to be $15,500 as of the date of his report, February 25, 1967.

Both the Ball and Wynn appraisals were updated to reflect the fair market value of the property on June 7, 1962, the statutory date of taking. Ball's to $10,000 and Wynn's to $19,700.

At the trial before the Referee the Petitioners subpoenaed witnesses from the Highway Department, it's Appraisal Review Board, and the ex-officio body known as the Governor's Screening Committee and sought to present evidence to establish that the Commissioner acting by said Review Board had initially fixed damages pursuant to Section 13a-73(b) C.G.S. and, in accordance with federal and state administrative procedures had established the fair market value of the subject property based upon the Wynn report in the amount of $15,500. However, the evidence would have shown that the

Screening Committee, not an agency of the Commissioner or the Highway Department, had directed the Commissioner to revise his assessment of damages and to secure another appraisal in a lesser amount. Evidence was sought to be introduced which would show that it was the usual procedure to require only one appraisal report in situations where the initial appraisal found fair market value in an amount less than $25,000. Objections to this line of questioning were raised by the Assistant Attorney General representing the State. These objections were sustained by the trial court. (R. pp. 13-24)

All attempts on the part of Petitioners' counsel to introduce this evidence and to explain and justify his reasons for so doing were rejected by the Referee. Plaintiffs' counsel was threatened with contempt for continuing in his efforts to establish the relevance of the proposed testimony (R. p. 23)

The Referee, acting in the capacity of the Superior Court entered judgment in the amount of $13,860 for the Petitioners. (Appendix B. infra, pp. 18-20). An appeal was then taken from the judgment to the Supreme Court of Connecticut.

FEDERAL QUESTIONS RAISED

The federal question here presented were specifically raised by the Petitioners in their Assignment of Errors to the trial court as follows:

> "In refusing to permit plaintiff the right to show through witnesses under subpoena that the Highway Department in arriving at its assessment of damages, failed to consider all the elements of just compensation in assessing damages to the plaintiff based upon fair market value of the property rather than just compensation." (R. p. 26)

The trial court made no corrections based upon the foregoing Assignment of Errors.

The Petitioners' Brief to the Supreme Court of Connecticut asserted (Brief p. 9):

> "The Referee refused to allow the Plaintiffs to introduce evidence to establish that with regard to the Highway Commissioner's taking of their property the statutes had not been followed, thus denying to them the "due process of law" guaranteed by Article 1, Section 8 of the Connecticut Constitution as well as the Fifth and Fourteenth Amendments to the United States Constitution. The requirement of due process of law as set forth in the Fourteenth Amendment to the Federal Constitution . . . relates to the substance of any legislative enactment as well as to the procedure and forms adopted for carrying it into effect."

In addition to the above, all aspects of Petitioners' claims of a denial of due process of law and a denial of just compensation under the Federal Constitution were pursued in argument before the Connecticut Supreme Court.

DECISION OF THE COURT BELOW

The Connecticut Supreme Court found no error in the Referee's refusal to allow testimony concerning the Comissioner's administrative procedures and with regard to the actions of the Review Board and the Screening Committee. The Court reasoned that any failure on the part of the Commissioner to follow the statutes was irrelevant in that the only issue before the Referee was the fair value of the subject property. The means by which the Commissioner arrived at his assessment of damages, the Court held, did not bear on that issue. (Appendix A, infra, pp. 10-17).

REASONS FOR GRANTING THE WRIT

While this case is important to the Petitioners in that they have suffered a pecuniary loss because of the actions of the Commissioner and the Governor's Screening Committee in assessing damages resulting from the taking of their property and by reason of the State courts exclusion of evidence of such improper assessment, yet the issue here is more important than the mere pecuniary loss they have suffered. The issue when reduced to simple terms is; can a State Agency charged with great powers of eminent domain ignore the legislative mandate granting those powers and

its own administrative procedures with impunity to the detriment of individuals whose property is acquired?

In effect the State has engaged in "witness shopping" which practice has been condemned by the Courts. "It ill-behooves the sovereign, in taking property of its citizens for public improvement, to indulge in "witness-shopping" to obtain a bargain price in the acquisition of property." Town of Thomaston v. Highway Commissioner, (unreported) No. 18180, Superior Court Litchfield County (1965) affirmed, 156 Conn. 166, 239 A2d 515. State v. Washington Horse Breeders Association, 64 Wash. 2d 748, 394 P. 2d 218. The detriment suffered by property owners as a result of these practices should be considered by the courts in evaluating "just compensation".

The measure of damages when any particular piece of property is taken or injured for public use under the power of eminent domain is just compensation. Berman v. Parker, 75 S.Ct. 98, 348 U.S. 26, 99 L. Ed. 27 (1954); 29A C.J.S. Eminent Domain, Sec. 136(1), Winchester v. Cox (1962), 26A 2d 592, 129 Conn. 106. Due process of law requires compensation to be made or secured to the owner when private property is taken by a State or under its authority for public use. Norwood v. Baker, Ohio, 19 S. Ct. 187, 172 U.S. 277, 43 L. Ed. 443 (1898). The securing of just compensation for the taking of property by a State's exercise of eminent domain is fundamental to due process of law. Chicago etc., R. Co. v. Illinois, 26 S. Ct. 341, 200 U.S. 561, 50 L. Ed. 596 (1906).

Under the applicable State Statute, 13a-73(b) C.G.S. the Highway Commissioner alone was empowered to assess damages for the taking of private property for highway purposes. Where the power of eminent domain is delegated by the Legislature it may be exercised only for the purposes, and in the manner, and subject to the conditions prescribed by the Legislature. 29A C.J.S. Eminent Domain Sec. 89(1). See State ex rel. Barlow v. Kaminsky (1957), 144 Conn. 612, 136 A2d 792.

At the trial the Petitioner sought to prove that the Commissioner's assessment of damages, the so-called "registered value" was fixed by the Review Board and in accordance with usual procedure was then submitted to, and rejected by, the Governors' Screening Committee when that body had no power by statute to review the determinations of the Commissioner. The Screening Committee directed that a lower appraisal be secured, and there was evidence to be introduced to the effect that a member of the Screening Committee himself hired an independent appraiser and directed him to arrive at a certain determination of fair market value. All of the evidence bearing upon the question of improper assessment of damages by the Commissioner was excluded by the trial court. In addition, the Petitioner sought to establish that the highway project was federally assisted and therefore subject to the policies and procedures of the Federal Department of Transportation, Highway Administration, Bureau of Public Roads. See State of Oklahoma v. U.S. Civil Service Commission, 67 S. Ct. 544, 330 U.S. 127, 91 L. Ed. 794 (1946). These policies and procedures are published in the form of the "Policy and Procedure Memorandum", a pertinent section of which is set forth in Appendix D, infra, p. 24. These policies and procedures had been incorporated as an administrative policy of the State Highway Department pursuant to 23 U.S.C. Sec. 108 and require that the "fair market value" of the property to be acquired must be determined by the Highway Department and offered to the proposed condemnee prior to the institution of formal condemnation. In accordance with those administrative procedures the registered or fair market value was initially and properly determined for the Petitioners' property based upon a higher appraisal than the one actually used by the Commissioner as his assessment of damages. This evidence also was excluded by the trial court.

The determination of the trial court to refuse the introduction of evidence bearing upon the administrative procedures of the Highway Department relating to the improper action of the Screening Committee and the fixing of fair market value by the Highway Department was upheld by the Supreme Court of Connecticut.

The relevance of the evidence sought to be introduced goes to the heart of the issue of just compensation and due process of law. Just compensation rests upon equitable principals. **Jefferson County, Tennessee v. T.V.A.**, (CCA6 1945) 146 Fed. 2d. 564, 566. The applicable statute, Section 13a-73(b) C.G.S. directs that the Commissioner pay to a property owner "all damages" suffered as a result of the taking of this property. Applicable administrative procedures require a determination of fair market value based upon a single appraisal. The Commissioner's failure to follow the statutory method of assessing damages and his own administrative procedures became relevant to an evaluation of the damages suffered by the Petitioners by reason of the taking of their property, for if the statute and administrative procedures had been followed the Petitioners would have had the benefit of an assessment of damages of $19,700, an amount over 100% higher than the assessment finally arrived at by the Commissioner. The Petitioners were obliged to assume an additional time consuming and costly burden which the statutes (Appendices C and D, infra, pp. 21-23) and administrative procedures were intended to prevent, i.e. the acceptance of a properly assessed damage figure, represented by the fair market value of their property, without the necessity of resorting to litigation. The denial of this option to the Petitioners by improper actions and procedures of State agencies and the resultant additional expense caused thereby are equitable considerations which should have been considered in the court's determination of just compensation. The due process clause of the Fourteenth Amendment requires that action by a state through any of its agencies must be consistent with the fundamental principles of liberty and justice which lie at the base of our civil and political institutions, which not infrequently are designated as "the law of the land". **Buchalter v. New York**, 319 U.S. 427, 63 S. Ct. 1129, 87 L. Ed. 1492 (1942).

The refusal of the trial court to admit such evidence was a denial of the Petitioners' right to due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States. The action of the Supreme Court of

Connecticut in upholding the Court's ruling perpetrated the denial of due process of law.

CONCLUSION

The decision below is erroneous. It would deny to the citizens of Connecticut their right to due process of law by allowing state courts to refuse to recognize all elements fairly comprising just compensation for property taken by eminent domain. The present petition for a writ of certiorari should therefore be granted.

Respectfully submitted,

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September 30, 1970

APPENDIX A

Decision of the Supreme Court of Connecticut

SUPREME COURT

May Term, 1970

Mae Gentile et al. v. Howard S. Ives, Highway Commissioner

Appeal from an appraisal of damages for land taken for highway purposes, brought to the Superior Court in Fairfield County and referred to Hon. James E. Murphy, state referee, who, exercising the powers of the Superior Court, rendered judgment for the plaintiffs, from which they appealed to this court. No error.

Abraham D. Slavitt and Benson A. Snaider, with whom, on the brief, was Robert A. Slavitt, for the appellants (plaintiffs.)

William A. McQueeney, assistant attorney general, with whom, on the brief, was Robert K. Killian, attorney general, for the appellee (defendant).

Ryan, J. The plaintiffs have appealed from a judgment, rendered by a referee exercising the powers of the Superior Court, reassessing the damages sustained by the plaintiffs in the taking by the defendant of a portion of their property for highway purposes.

The plaintiffs assign error in the failure of the referee to find certain facts and in the finding of other facts without evidence. "These assignments of error have not been pursued in their brief and are, therefore, treated as abandoned." Martin v. Kavanewsky, 157 Conn. 514, 516, 255 A.2d 619.

The following facts were found by the referee: On June 8, 1961, the defendant [illegible] commissioner, pursuant to statute, filed a certificate of condemnation with the clerk of the Superior Court in Fairfield County and deposited the sum of $9000 to compensate the plaintiffs for the taking of 6160 square feet of land on Carson Avenue in the town of Bridgeport. The property is located in a light industrial zone not served by sanitary sewers, and the land in the general neighborhood is used chiefly for industrial and business purposes, with some residential use. The property is surrounded on the south and west by a cement block plant, and to the east by a construction company; diagonally across the street is a building supply material storehouse. The property contains a dilapidated shed and a small nondescript house which has always been used as a residence. Neither of these buildings adds any value to the land, and a plaintiffs' appraiser deducted $1200 from his land valuation for the expense of demolition. Although the Bridgeport zoning regulations permit any use permitted in a business zone, the limited area of the property restricts its adaptability for use in light industry because of the front- and rear-yard setbacks and off-street loading space requirements of the zoning laws. The plaintiffs offered two real estate appraisers who testified as to the value of the property and submitted the appraisal reports upon which they based their opinions. One of these witnesses valued the property at $20,700 and the other at $19,900. The plaintiffs also used as a witness Robert H. Wynn, who appraised the property for the defendant but was not called as a witness by him. Wynn valued the property at $15,500 and later updated his report and increased the value of the property to $19,700. All three of these appraisers predicated their valuations on the use of the property for light industry. The defendant relied on one appraiser, William H. Ball, who valued the property at $9000 for residential use and later increased his valuation to $10,000. In Arriving at their conclusions as to value, all three appraisers called by the plaintiffs as witnesses used sales which they considered comparable. Similarly zoned land located nearby on Sylvan Avenue, near North Avenue (a heavily traveled road also known as route 1), was valued by two of the witnesses at $4 a square foot and by one of them at $3.38. The subject property, located

almost a full block west of Sylvan Avenue and one block north of North Avenue, is on Carson Street, which carries a moderate amount of traffic. A spur railroad track crosses Carson Street just west of Colonial Avenue at grade, causing a hump in the road. The referee was familiar with all the sites and viewed them as well as the subject property for the purpose of comparison.

The referee concluded that only the properties on Sylvan Avenue and on Island Brook Avenue were comparable, and in comparing those with the subject property, he considered the time and nature of the sales, the topography, the size of the subject lot and the limited appeal it would have to a buyer on the open market (other than the owner of the adjoining cement block plant). The referee concluded that the highest and best use of the plaintiffs' property of June 8, 1968, the date of the taking, was for light industrial purposes, and the state's assessment of damages based upon residential use of the property was contrary to reality as well as zoning; that since it was surrounded on three sides by industrial property, the land can be valued only for light industrial use, and because of its limited area, the desirability of the property for a single industry is debatable, a fact which would be reflected in its marketability; and that the value as of the date of taking was $13,860, computed at $2.25 a square foot.

The plaintiffs also assign error in the refusal of the referee to admit evidence concerning the administrative procedure in the office of the defendant leading to the determination of the assessment of benefits and damages by him. "[S]uch as assessment 'constitutes but a formal offer to the landowner, which he may or may not accept, as a step toward payment by the State if he does accept and to the institution of proceedings in court if he does not,' inadequacy in the amount of which affords no ground for interference by the court (Munson v. MacDonald, 113 Conn. 651, 657, 155 Atl. 910) . . . ." Stock v. Cox, 125 Conn. 405, 418, 6 A.2d 346. "Under article first, § 11, of the Connecticut constitution, no property shall be taken for a public use without just compensation. This means a fair equivalent in money for the property taken from the condemnee as nearly as its nature will permit.

Ordinarily, although not necessarily, this is the market value of the property taken. But the question of what is just com-

The plaintiffs assign error in the referee's refusal to permit them to introduce evidence for the purpose of establishing that the defendant acted contrary to law and the policies and procedures fixed by directives under the Federal-Aid Highway Act, 23 U.S.C. §§ 101-141. There is nothing in the record to indicate that the highway project in question, known as the "Relocation of Routes 25 and 8, Bridgeport-Trumbull Road," was part of the Federal-Aid Highway system. It is, therefore, unnecessary to discuss the federal statute and regulations referred to by the plaintiffs.

pensation is an equitable one rather than a strictly legal or technical one. The paramount law intends that the condemnee shall be put in as good condition pecuniarily by just compensation as he would have been in had the property not been taken. Winchester v. Cox, 129 Conn. 106, 114, 26 A.2d 592; Nicholson v. Weaver, 194 F.2d 804, 807 (9th Cir.)." Colaluca v. Ives, 150 Conn. 521, 530, 191 A.2d 340. In the event the landowner believes that the amount of the assessment is too low, he is not bound to accept it. The issue before the referee was the fair value of the subject property. The referee correctly concluded that evidence relating to the administrative procedure by means of which the commissioner's assessment was arrived at was irrelevant.

The plaintiffs also sought to introduce evidence to establish the "registered value" of the property as determined by a review board. The plaintiffs claim that this constituted an admission of the value of the property by the defendant. The conclusion of a review board is not that of the defendant and cannot under any circumstances be regarded as an admission by him. Since the issue before the referee was the fair value of the subject property, any administrative evaluation merely represents the opinion of persons whose qualifications for evaluating the property are unknown to the referee. Under § 13a-73(b) of the General Statutes, the defendant commissioner shall make an assessment of benefits and damages which is the price offered to the plaintiffs as compensation

for their property. On appeal, the question before the referee is not what the defendant offered to the plaintiffs nor what the plaintiffs claimed was due them, but rather the actual fair value of the property as determined at the hearing. The referee was correct in excluding such evidence.

In this state the judicial review provided for under our statutes is designed to ensure that the condemnee receives just compensation for his property. In **Stanley Works v. New Britain Redevelopment Agency**, 155 Conn. 86, 95, 230 A.2d 9, we held that the trial court did not abuse its discretion in ordering the mutual exchange by the parties of the appraisal reports for inspection and copying. In **Thomaston v. Ives**, 156 Conn. 166, 173, 239 A.2d 515, we held that in an eminent domain proceeding initiated by the state "justice is best served . . . by requiring the appraiser [employed by the state] to testify to his expert opinion when called upon to do so" by the landowner even against the objection of the state. In that case we emphasized that "[t]he only question in issue is the fair value of the property seized. The single objective of the present proceeding is to ensure that the property owner shall receive, and that the state shall only be required to pay, the just compensation which the fundamental law promises the owner for the property which the state has seen fit to take for public use. All material and relevant information which will assist the trier in determining the sum of money which will constitute that just compensation should, in justice to both parties, be made available to him." Id., 174. With that purpose in mind, the following rule was adopted in 1967: "In making a reference in any eminent domain proceeding, the court shall fix a date not more than sixty days thereafter, unless for good cause shown a longer period is required, on which the parties shall exchange copies of their appraisal reports . . . . Such reports shall set forth the valuation placed upon the property in issue and the details of the items of, or the basis for, such valuation." See Practice Book §352.

In the instant case the trial court ordered the exchange of appraisal reports. The plaintiffs not only received the appraisal reports of the state's experts but called one of its experts as their witness. The plaintiffs' rights were adequately

protected, and there is no justification for the plaintiffs' claim concerning lack of protection against "witness shopping" by the state. Furthermore, under our statutes the state is penalized if the assessment under-values the property taken. "The landowner is entitled to interest at the legal rate of 6 percent (General Statutes § 37-3) from the date of the filing of the assessment to the date of payment, as a proper element of damages . . . [except that] the landowner is not entitled to interest on any sum of money which has been deposited with the court and is available to him." **Salgreen Realty Co. v. Ives**, 149 Conn. 208, 212, 214, 177 A.2d 673; **E. & F. Construction Co. v. Ives**, 156 Conn. 416, 420, 242 A.2d 768. The claim of the plaintiffs that the defendant acted contrary to law and the policies and procedures of statute cannot be sustained.

The plaintiffs also assign error in the referee's evaluation of the subject property in the amount of $13,860, computed at $2.25 per square foot, when no evidence was offered at the hearing as to that amount. The referee determined that the highest and best use of the property was for light industrial purposes. Three experts called by the plaintiffs evaluated the property at $19,700, $19,900, and $20,700 on the basis of comparable property sales. The defendant relied on one appraiser, who valued the property at $9000 for residential use and later increased his valuation to $10,000. The plaintiffs urge that there was no witness whose appraisal valued the property at the figure used by the referee. They concede that in arriving at his conclusion of value the referee is not bound by the opinions of the experts, in that he need not fully accept the report of any expert. They claim, however that the conclusions of the referee were not supported by competent evidence. "The purpose of offering in evidence the opinions of experts as to the value of land is to aid the trier to arrive at his own conclusion, which is to be reached by weighing those opinions in the light of all the circumstances in evidence bearing upon value and his own general knowledge of the elements going to establish it. **Moss v. New Haven Redevelopment Agency**, 146 Conn. 421, 425, 151 A.2d 693; **Appeal of Cohen**, 117 Conn. 75, 85, 166 A. 747. Ultimately, the determination of the value of the land depended on the considered judgment of the referee, taking into account the divergent

opinions expressed by the witnesses and the claims advanced by the parties. . . . **Benson v. North Haven**, 126 Conn. 506, 510, 12 A.2d 551." **Bennett v. New Haven Redevelopment Agency**, 148 Conn. 513, 516, 172 A.2d 612.

In the instant case, the referee accepted the opinion of the plaintiffs' witnesses that the highest and best use of the plaintiffs' property was for light industrial purposes. The experts, in arriving at their valuations, used sales of other real estate which they regarded as comparable to the subject property. In arriving at the fair value of the property, the referee disregarded some of the sales of property located several blocks away from the subject property because they were not truly comparable. As to other sales used as comparables by the experts, he considered the time and nature of the sales, the superior location of the comparables to that of the subject property, the topography, the size of the plaintiffs' lot and the limited appeal it would have to a buyer on the open market. The referee concluded that because of the limited area of the subject property its desirability for a single industry is debatable and that that fact would be reflected in its marketability. The referee viewed all the properties. "We have consistently held that the visual observations made by the trier on a visit to the property are as much evidence as the evidence presented for his consideration by the witnesses under oath. They are in fact supplemental evidence." **Houston v. Highway Commissioner**, 152 Conn. 557, 558, 210 A.2d 176.

The plaintiffs urge in their brief that the referee failed to put any value on the improvements on the property which consisted of a small nondescript house and a dilapidated shed. The referee found that neither of these structures added any value to the land. The plaintiffs' appraiser deducted $1200 from his land valuation for the demolition of these structures. On these facts it was not erroneous for the referee to conclude that the structures added nothing to the value of the land for industrial purposes.

There is nothing to show that in determining the value of the plaintiffs' land the referee misapplied or overlooked, or

gave a wrong or improper effect to, any test or consideration which it was his duty to regard. **Bennett v. New Haven Redevelopment Agency**, supra; **Morgan v. Hill**, 139 Conn. 159, 161, 90 A.2d 641.

There is no error.

In this opinion the other judges concurred.

APPENDIX B

Decision and Judgment of the Trial Court

1. Memorandum of Decision

No. 133619

MAE GENTILE, ET ALS.

vs.

HOWARD S. IVES, Highway Commissioner, State of Conn.

SUPERIOR COURT

FAIRFIELD COUNTY

November 7, 1968

MEMORANDUM OF DECISION

The plaintiffs are the owners of a very small house at 7 Carson Street in Bridgeport which was built well over a hundred years ago but unfortunately now has no value even as an antique. However, it has been home to the named plaintiff and the members of the family for many years. With the advent of zoning and the incursion of industry, what had been a quiet residential neighborhood lost its charm as such. It is zoned for light industry.

Surrounded as it is on three sides by industrial property, the land can be valued only for light industrial use. Because of its limited area its desirability for a single industry is debatable and would be reflected in its marketability.

The State's award was based on an appraisal as residential property. I can see no merit in this belief. It is contrary to reality as well as zoning.

Considering all of the elements, both favorable and unfavorable, that enter into the determination of the fair

value of this property, I find that it was reasonably worth $13,860.00 at the time of taking.

Judgment is rendered reassessing the award to the plaintiffs at $13,860.00. Allowance is made to the plaintiffs for the appraisers who testified for them in the following amounts: Mr. Pisaretz, $425.00; Mr. Lefsetz, $175.00 and Mr. Wynn, $100.00.

Filed: Nov. 7, 1968.

JAMES E. MURPHY,
State Referee.

2. Judgment

STATE OF CONNECTICUT

MAE GENTILE, LAWRENCE S. SMITH, JR. and FRANK SMITH, of the City of Bridgeport, GRACE KOCH of the City of Trumbull, ELAINE GARGULIO of the City of Fairfield and NATILIE MOSCA of the City of Stratford, all of the County of Fairfield and State of Connecticut,	SUPERIOR COURT FAIRFIELD COUNTY AT BRIDGEPORT November 7, 1968
vs.	
HOWARD S. IVES, State Highway Commissioner.	

Present, HON. JAMES E. MURPHY, State Referee

JUDGMENT

This appeal by the plaintiffs, dated June 13, 1969, from the Assessment of Damages filed by the defendant with the Clerk of this Court for the taking of certain land owned by the plaintiffs, situated on the southerly side of Carson Street in the City of Bridgeport, County of Fairfield, State of Connecticut, and more particularly described in said

appeal and in said Assessment of Damages, for the taking of which said defendant appraised the damages due the plaintiffs to be $9,000.00, and praying that the damages be reappraised, came to this Court on the Third Tuesday of July, 1968, the defendant having deposited on June 10, 1968, with said Clerk the sum of $9,000.00 to the use of the persons entitled thereto, and said action came thence to August 13, 1968, when, notice of the pendency of said appeal having been given to said defendant, the Court referred said appeal to the Hon. James E. Murphy, a State Referee, to make a reassessment of damages, and thence to the present time when the parties appeared and were heard.

The said State Referee, having heard the parties, finds that the amount due to the plaintiffs as damages for the taking of said land is $13,860.00, that the sum of $9,000.00 has been deposited by the defendant for the use of the persons entitled thereto on account of the just compensation to be awarded, that the amount of the deficiency between the compensation finally awarded and the amount of money so deposited is $4,860.00, that the sum of $700.00 is a reasonable amount to award the plaintiff as appraisal fees, and expert testimony fees.

Whereupon it is adjudged that the defendant pay to the plaintiff the amount of the deficiency in the sum of $4,860.00, interest to the date of payment, and costs taxed at $, which costs include said appraisal fees and said expert testimoney fees in the amount of $700.00.

By The Court,

C. DAVID MUNICH
Asst. Clerk.

APPENDIX C

Pertinent Connecticut Statutes

1. Section 13a-73 subsection (c) of the Connecticut General Statutes (Revision of 1958), entitled "Purchase", provides as follows:

> The commissioner may purchase any land and take a deed thereof in the name of the state when such land is needed in connection with the layout, construction, repair, reconstruction or maintenance of any state highway or bridge, and any land or buildings or both, necessary, in his opinion, for the efficient accomplishment of the foregoing purpose, provided any purchase of such land or land and buildings in an amount in excess of the sum of three thousand dollars shall be approved by a state referee. The commissioner, with the advice and consent of the attorney general, may settle and compromise any claim by any person, firm or corporation claiming to be aggrieved by such layout, construction, reconstruction, repair or maintenance by the payment of money, the transfer of other land acquired for or in connection with highway purposes, or otherwise.

2. Section 13a-74 of the Connecticut General Statutes (Revision of 1958), entitled, Payment of Damages", provides as follows:

> After the assessment of damages and benefits provided for in subsection (b) of section 13a-73 has been filed with the clerk of the superior court, the property owner affected may file with said clerk his written acceptance thereof. Said clerk shall thereupon notify the comptroller and the commissioner of such acceptance. If the amount to be paid by the state for such land, after deducting any benefits which have been assessed, does not exceed fifteen thousand dollars, said clerk shall send a certified copy of the assessment and the acceptance thereof to the commissioner and the comptroller, and the comptroller shall, upon receipt thereof, draw his order upon the treasurer in favor of such property owner for the amount due him under such assessment. If the amount of such assessment, after deducting any such benefits, exceeds

fifteen thousand dollars, said clerk shall not certify the same to the comptroller until the assessment has been approved as reasonable in amount by a state referee. If such state referee approves such assessment, said clerk shall thereupon send a certified copy of the assessment and the acceptance thereof and a certificate that the same has been so approved to the commissioner and to the comptroller, and the comptroller shall, upon receipt thereof, draw his order upon the treasurer in favor of such property owner for amount due him on such assessment. If such state referee does not approve such assessment, said clerk shall notify the attorney general and the commissioner and the latter may file an amended assessment.

3. Section 13a-76 of the Connecticut General Statutes (Revision of 1958) entitled "Appeal provides in pertinent part as follows:

Any person claiming to be aggrieved by the assessment of such special damages or such special benefits by the commissioner may, at any time within six months after the same has been so filed, apply to the superior court for the county within which such land is situated or, if said court is not in session, to any judge thereof for a reassessment of such damages or such benefits so far as the same affect such applicant, and said court or such judge, after causing notice of the pendency of such application to be given to said commissioner, shall appoint a state referee to make such reassessment of such damages or such benefits.

APPENDIX D

Applicable Federal Statutes and Rules

1. 23 U.S. Code, Sec. 108 entitled "Advance acquisition of rights-of-way" provides as follows:

> "(a) For the purpose of facilitating the acquisition of rights-of-way on any of the Federal-aid highway systems, including the Interstate System, in the most expeditious and economical manner, and recognizing that the acquisition of rights-of-way requires lengthy planning and negotiations if it is to be done at a reasonable cost, the Secretary, upon the request of the State highway department, is authorized to make available the funds apportioned to any State for expenditure on any of the Federal-aid highway systems, including the Interstate System, for acquisition of rights-of-way, in anticipation of construction and under such rules and regulations as the Secretary may prescribe. The agreement between the Secretary and the State Highway department for the reimbursement of the cost of such rights-of-way shall provide for the actual construction of a road on such rights-of-way within a period not exceeding seven years following the fiscal year in which such request is made.

2. 23 U.S. Code Sec. 141 entitled "Real property acquisition policies" provides as follows:

> Before approving projects under this chapter, the Secretary [of Transportation] shall obtain from the State highway department the following assurances: (1) that every reasonable effort shall be made to acquire the real property by negotiation;
>
> (2) that the construction of projects shall be so scheduled that to the greatest extent practicable no person lawfully occupying the real property shall be required to move from his home, farm, or business location without at least 90 days' written notice from the State or political subdivision having responsibility for such acquisition; and

(3) that it will be the policy of the State, before initiating negotiations for real property, to establish an amount which is believed to be just compensation, under the law of the State, and to make a prompt offer to acquire the property for the full amount so established.

3. The U.S. Department of Transportation, Federal Highway Administration, Bureau of Public Roads, Policy and Procedure Memorandum, Transmittal 98, dated June 21, 1967, entitled "Right of Way Procedures (Appraisals and Appraisal Review)" provides in pertinant part as follows at paragraph 2:

APPRAISAL REVIEW

a. Within each State highway department there shall be designated a sufficient number of qualified review appraisers to accomplish the State's workload. Such review appraisers shall be delegated authority to determine the fair market value of real property which amount is to govern negotiations and settlements. Such determination must be made before the start of negotiations or hearings in condemnation.